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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 227

(No. 1459 October Term, 1966)

FEDERAL POWER COMMISSION,

Petitioner,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL,

Respondents,

No. 415

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS, PLACID OIL COMPANY, *ET AL.*

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August 4, 1967

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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Placid Oil Company, Margaret Hunt Hill Trustee for Hassie Hunt Trust, H. L. Hunt and Hunt Oil Company, (hereinafter referred to as Placid, *et al,*), respondents in the captioned case, file this their Brief in Opposition and pray that the captioned Petitions for Writ of Certiorari to review

the judgment of the United States Court of Appeals for the Tenth Circuit entered on March 9, 1967, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit and its Per Curiam opinion on rehearing, are reported in 376 F. 2d 161. (App. A. pp. 8-28 and App. B, pp. 29-33 of the Federal Power Commission's Petition for Writ of Certiorari). The opinion and order of the Federal Power Commission are reported at 32 FPC 254 (J.A. 337-392), and its opinion and orders on rehearing at 32 FPC 952 (J.A. 456-467) and 32 FPC 1358 (J.A. 481-482).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions filed herein.

QUESTION PRESENTED

Whether, after a no-refund temporary certificate[1] becomes final and is no longer subject to modification by the Commission or the courts, the Commission, upon issuing a permanent certificate to replace the temporary one, can require a producer to refund a portion of the price collected during the pendency of such temporary certificate, particularly when the producers had been repeatedly assured by the Commission that no refunds would be required under temporary certificates which did not contain express refund conditions.

[1]A no-refund temporary certificate is one which does not contain any type of a refund provision.

In order to fully appreciate the question, one must keep in mind the fact that the administrative proceeding involved the following three types of temporary certificates of public convenience and necessity issued by the Federal Power Commission:

(1) Those authorizing the sales as requested without any conditions as to price reduction or refund.

(2) Those authorizing the sales on condition that the price be reduced but without any refund provision, for example, prices of 23.675¢ per Mcf were reduced to 21.25¢ per Mcf.[2]

(3) Those authorizing sales on condition that the price be reduced and that the producer agree to refund all amounts collected in excess of the price finally determined to be proper down to a floor of 20¢ per Mcf, for example, prices of 23.6¢ per Mcf were reduced to 23.25¢ per Mcf subject to refund down to the floor.[3]

[2] See letter order of October 9, 1962, (J.A. 195-196) to J. Ray McDermott and Company, Inc. which provides in part as follows:

"* * * This temporary certificate is issued subject to the following express conditions:

(1) That the total initial price therefor shall not exceed 21.25 cents per Mcf at 15.025 psia, inclusive of tax reimbursement.

(2) The above specified rate shall remain in effect until changed by Commission order in this proceeding, Docket No. C163-301."

[3] For example, see letter order of June 13, 1961, (J.A. 159-160) to Placid Oil Company which provides in part as follows:

"Temporary authority is hereby issued * * * at an initial rate of 23.25 cents per Mcf at 15.025 psia (inclusive of tax reimbursement) subject to the condition that Placid refund to Tennessee any amounts in excess of the amount resulting from the rate finally determined to be proper in Docket No. C161-1362. If the rate found to be required by the public convenience and necessity is less than 20 cents per Mcf at 15.025 psia (inclusive of tax reimbursement), Placid shall only be required to refund any amounts collected under this authorization at a rate above 20 cents per Mcf at 15.025 psia (inclusive of tax reimbursement). The above specified rate and the condition attached thereto shall remain in effect until changed by further Commission order in this proceeding, Docket No. C161-1362."

The court below upheld both the price reducing and the refund conditions of the type (3) certificates and the price reducing conditions of the type (2) certificates. Therefore, the question presented to this Court involves only the type (1) certificates which are not conditioned in any way and the type (2) certificates which have price reduction conditions but do not have refund conditions. In essence, the Federal Power Commission is asking this Court to retroactively convert the type (1) and type (2) certificates into type (3) certificates.

STATUTES INVOLVED

The pertinent provisions of Section 7 of the Natural Gas Act, 52 Stat. 821-833, as amended 15 U.S.C. 717-717w, are set forth in the Petition of the Federal Power Commission No. 227 (FPC Pet., pp. 2-3)

STATEMENT

The proceeding before the Federal Power Commission originally involved 362 separate applications for certificates of public convenience and necessity authorizing sales of natural gas by independent producers to various purchasers from the South Louisiana Area. (J.A. 353)

The producers applied for temporary authorizations to commence the sales pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c) and Section 157.28 of the Commission's Regulations. Insofar as is pertinent here, the Commission, as noted above, granted a number of the temporary certificates without conditions as requested; others were granted on condition that the price be reduced to 21.25¢ per

Mcf but without imposing a refund obligation; and still others were conditioned to provide for a reduced price and in addition the refund of all amounts collected in excess of the rate finally determined to be appropriate down to a floor of 20¢ per Mcf.

The District of Columbia Court of Appeals[4] upheld the only three temporary certificates that were appealed. All of the others became final and no longer subject to retroactive modification by virtue of Section 19 of the Natural Gas Act 15 U.S.C. 717r.

The producers irrevocably[5] dedicated their gas to interstate use in reliance upon the temporary certificates. Thereafter Public Service Electric and Gas Company, Long Island Lighting Company (Petitioner herein in No. 415) and United Gas Improvement Company filed a motion to *prospectively* impose refund conditions on the sales to Transcontinental Gas Pipe Line Corporation by amending the temporary certificates previously issued. The commission categorically denied the motion stating that "Since the producers cannot abandon service without our authority and since, as indicated above, it would not be in the pulic interest to approve any such abandonment request, we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them".[6] The

[4] *Public Service Commission of the State of New York v. Federal Power Commission*, 327 F. 2d 893 (CADC 1964).

[5] Once deliveries of gas are commenced in interstate commerce, the producers must obtain permission of the Federal Power Commission pursuant to Section 7(b) of the Natural Gas Act 15 USC 717f(b) before such service can be discontinued.

[6] *Area Rate Proceeding et al* Docket Number AR 61-2 *et al; Amerada Petroleum Corporation* Docket Number C160-688 *et al*, 29 FPC 223, 225, order issued Feb 5, 1963.

commission's order denying the motion requesting the imposition of refund conditions upon the temporary certificates prospectively was not appealed.

Many of the dockets were settled during the hearing process. The Commission issued permanent certificates for the remaining sales on condition that the price be reduced to 18.5¢ per Mcf for gas produced from the offshore wells located in the Federal Domain and 18.5¢ per Mcf base price plus an allowance of 1.5¢ per Mcf tax reimbursement for gas produced from wells subject to the Louisiana taxing jurisdiction. (J.A. 360)

In granting the permanent certificates, the Commission ordered refunds of all amounts collected in excess of 20.0¢ per Mcf under the type (3) temporary certificates containing express refund conditions (J.A. 363, 306-307) and further asserted the power to order at some subsequent date refunds of all or a portion of any amounts collected under the type (1) and (2) temporary certificates above the 18.5¢ per Mcf plus 1.5¢ tax allowance. (J.A. 363 & 378)

As the Commission points out in its statement (Page 4 of the Pet. for Cert. No. 227), the temporary certificates stated that their issuance was without prejudice to subsequent Commission action on the applications for permanent certification, citing J.A., Pg. 125,[1] but language identical in

[1] The temporary certificate provides as follows:

"* * * such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act."

substance is included in the permanent certificate[8] issued to replace the temporary certificate. Does this mean that refunds can be ordered under permanent certificates if the just and reasonable rate is later determined to be less than the certificated price?

The Court of Appeals for the Tenth Circuit upheld the Commission in its determination of the price for offshore gas and in its determination of the 18.5¢ per Mcf base price for onshore gas, but held that there was "* * * no support for the rather summary treatment of the 1.5 cent additional allowance for tax reimbursement where the gas is sold subject to the taxing jurisdiction of Louisiana." (Pet. for Cert. No. 227, App. A, Pg. 19: Affirmed on Rehearing, App. B., Pp. 29-33). The court further held that the Commission may not order refunds of amounts collected under temporary certificates unless such certificates expressly provide for a refund (Pet. for Cert. No. 227, App. A, Pg. 25-26) stating:

> "The very fact that many temporary authorizations now contain refund conditions attests to their role in holding the line against changing prices. And whatever the method by which temporary authorizations are handled, we consider it unconscionable to impose upon an un-

[8] This provision recommended by the Examiner (J.A. 307, R-19324) and adopted by the Commission in Opinion 436, ordering Paragraph (I), J.A. 379, R-20699 and made a part of the permanent certificates reads as follows:

> "* * * Such grant is without prejudice to any findings or order which has been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants. Further, the action in this proceeding shall not foreclose nor prejudice any further proceedings or objections by the Commission relating to the operation of any price or related provision in the gas purchase contracts here involved." (J.A. 307)

wary producer a hidden liability which could very well, had it been originally exposed, have influenced the initial producer decision of whether to dedicate his gas to interstate commerce. The principle of imposing and enforcing a retroactive condition where none exists, if carried to the extreme, could expand to render a fully established Section 5 just and reasonable rate totally unstable and always subject to the lurking possibility of refund." [Pet. for Cert. No. 227, App. A, Pg. 27-28]

REASONS FOR DENYING THE WRIT

For the reasons alleged to warrant review of the instant case, the Commission referred this court to a Petition for Certiorari in *Federal Power Commission v. Sunray DX Oil Company, et al.*, October Term 1966, No. 1133.

In Sunray No. 1133, the Commission alleged that the decision of the court below was clearly wrong and inconsistent with earlier decisions of this Court, that the decision presented a question of substantial importance in the administration of the Natural Gas Act, and that there was a conflict among the circuits.

Respondents submit that the decision below is clearly correct, that the question presented, even if it does involve a conflict, is not of sufficient importance to warrant granting the writ, and that a division among circuits is not a sufficient reason to grant certiorari in a case where the decision is clearly correct and where, as here, the issue has already been resolved by the Commission as to the future.

(1) The Decision Below is Clearly Correct

In holding that "refunds may be ordered under Section 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition" [Pet. for Cert. No. 227, App. A, pp. 25-26], the court merely affirmed what the Commission repeatedly stated to be the meaning, intent, and extent of the temporary certificates and precisely what all parties believed to be the only interpretation of such orders. As the General Counsel for the Commission stated,

> "The history of Commission Producer Regulations with respect to temporary authorizations clearly shows, however, that a producer in accepting the unconditioned temporary authorization such as those involved here would have had no reason to assume that they might later be required to make refunds for the period that the temporary authorizations were in effect." (Brief Pg. 29 in Case No. 17582, et al., *Public Service Commission of the State of New York v. FPC*, 329 F. 2d 242, *cert. den. sub. nom. Prado Oil and Gas v. FPC*, 377 U.S. 963)

The Chairman of the Commission in an address at the 1961 annual meeting of the American Petroleum Institute publicly advised the leaders of the industry that temporary certificates issued without price conditions were intended to "authorize initial sales *on a firm basis*" so that the "producers may know that all of the new initial price is theirs to keep * * * "[*]

[*] Swidler, Joseph C., Address to the Annual Meeting of the API (Nov. 15, 1961).

Moreover, a unanimous Commission denied a motion of certain intervenors which requested that the existing temporary certificates in twenty-four of the dockets (29 FPC 223) in this very proceeding either be replaced or amended to provide for appropriate refunds "from the date of the Commission's orders" imposing the refund obligation (29 FPC 223, 224). In describing and identifying the temporary certificates, the Commission said that "[T]he initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications" (29 FPC at Pg. 224). The Commission characterized the motion as "little more than an argument that we should unilaterally impose a new refund commitment upon the producers". The Commission then unequivocally reassured the producers that no refunds would be required by flatly stating "This we will not do", explaining that "* * * we would be in a position of having induced producers to dedicate their gas to the market upon one set of conditions, and then imposing more stringent conditions upon them." (29 FPC at Pg. 225)

In granting temporary certificates, the Commission has the authority and discretion to issue such certificates as requested or to attach whatever conditions it deems necessary to protect the consumer. That the Commission was fully aware of its power in this respect when it issued the temporary certificates is evident from its order denying

rehearing issued May 9, 1958[10] (19 FPC 663, 664-665) wherein the Commission held:

> "In the exercise of the Commission's authority under Sections 7 and 16 of the Act the attachment of conditions to orders granting temporary authorization is as proper as in the issuance of a permanent certificate. *Public Utilities Commission v. Federal Power Commission*, 205 F. 2d 116, 120; *J. M. Huber Corporation v. Federal Power Commission*, 236 F. 2d 550, 557; *Signal Oil and Gas Co. v. Federal Power Commission*, 238 F. 2d 771, Cert. den. 353 U.S. 923."

Obviously, if the Commission is free to require refunds under temporary certificates which do not contain refund conditions, non-conditioned certificates will in actuality be more onerous than expressly conditioned certificates which have the effect of limiting the amount of the refund and the imposition of express refund conditions in many certificates was a wholly meaningless act. If Petitioners prevail, the Commission could retroactively annul or amend any temporary certificate or modify any of the conditions imposed thereupon. It would even be free to withdraw the very conditions which may have induced the committal of gas to the interstate market. To impose upon an unwary natural gas company such hidden liabilities has been described by the court below as being "unconscionable", *Pan American Petroleum Corp. v. Federal Power Commission*, 376 F. 2d 161, 173 (Pet. for Cert., No. 227 App. A, pg. 27).

The Commission's authority and obligation to protect the consuming public during the pendency of temporary cer-

[10] In Re Sunray Mid-Continent Oil Company Docket Nos. G-13298 et al involving temporary authorizations of an independent producer.

tificates was the subject of this Court's decision in *Federal Power Commission v. Hunt*, 376 U.S. 515 (1964). There the court made clear not only the broad authority vested in the Commission in the issuance of temporary certificates under Section 7(e), but also the importance and necessity of such authority being properly exercised. Speaking through Mr. Justice Clark, the court stated:

> "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties. This condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate. In view of the *ex parte* nature of the proceeding, it appears only fair to all concerned that *the condition* upon which the rate was temporarily certified *be continued unchanged until the permanent certificate is issued.* (Emphasis added.) (376 U.S. at p. 523)

This is precisely the holding of the court below. Temporary certificates with conditions, as well as those without conditions, were upheld. The court merely refused to permit the Commission to retroactively change the conditions under which the sales were authorized.

The Commission, in the exercise of its administrative discretion, may not always precisely predict the price that it will ultimately determine on permanent certificate hearing to be required by the public convenience and necessity. In some cases, the permanent certificate price may be lower while in others, as in the Permian Basin Area, it may be higher. The initial price standard established by the Commission's Policy Statement for that area was 16¢, and temporary certificates issued thereafter were conditioned to this

price. However, permanent certificates were subsequently issued authorizing the same sales at 16.5¢ per Mcf.[11] Certainly, according to Petitioner's argument, the producers in such circumstances were entitled to a modification of their temporary certificates and retroactive payment of the difference in price. To so hold is to regard the Commission's issuance of temporary certificates as an exercise in futility which is clearly inconsistent with this Court's holdings in *Hunt supra* and *Callery.*[12]

(2) The Issue Presented is Not of Sufficient Importance to Warrant Intervention by This Court.

Petitioner, Federal Power Commission, acknowledges the matter in issue can be readily resolved by the Commission itself by the "inclusion in each new temporary certificate of an express condition obligating the producer to refund any charges found to be excessive", (Page 8 of Brief in the Sunray Case No. 1133). The fact of the matter is that the Commission by Order No. 336, Docket No. R-316, issued February 9, 1967, has already provided for express refund conditions where appropriate to be included in all future temporary certificates.[13] The fact that this issue relates to a limited number of pending cases is pointed out at Pg. 11-13 of Brief in Opposition for Respondent Lamar Hunt in the Sunray Case No. 1133, October 1966 Term.

[11] In re Area Rate Proceeding Docket No. AR 61-1, 34 F.P.C. 418 (1965).

[12] For an elaboration on this point, and the applicability of *United Gas Improvement Company v. Callery Properties, Inc.*, 382 U.S. 223 (1965), we respectfully refer this Court to pp. 7-11 of Brief in Opposition for Respondent Lamar Hunt in *Federal Power Commission, et al. v. Sunray DX Oil Company, et al.*, Nos. 1133, 1134, 1135, October Term 1966.

[13] Rules of Practice and Procedure, §2.63, 18 C.F.R., §2.63.

In that case, Respondent Lamar Hunt, in reviewing the Commission's extra record work papers used to support its assertion that the identical issue might arise in some 579 other contracts[14], found that of the 567 pending temporary certificates, 91 contain specific refund conditions, and, therefore, would not be affected by the decision below. Of the remaining 476 temporaries which do not contain refund conditions, 403 were temporarily certificated at or below the applicable "in-line" price as previously determined by the Commission, and, therefore, have no potential refund liability. Thus, at best, even ignoring any special circumstances, only 73 contracts could possibly be affected or controlled by the outcome of the decision below on this issue.

Likewise, the reference to potential refunds under pending cases is speculative.

In view of the locked-in period involved, the limited duration of the "in-line" pricing procedure, and the steps taken by the Commission to preclude the issue from being raised in the future, Respondents submits that the question presented is not of sufficient importance to warrant intervention and resolution by this Court.

(3) The Conflict Among the Courts of Appeal Specified by Petitioner Does Not Merit Intervention by This Court.

As noted above, the issue as to future cases has already been resolved by the Commission, and the impact of pending cases is narrowly confined. Therefore, this is not a situa-

[14] This is the number originally referred to in Petitioners' brief as 579 contracts. The Commission, we are informed, now states that the figure should have been 476 contracts.

tion where the conflict can *only be resolved* by prompt action of this Court.

Rule 19 of this Court expressly provides that a writ of certiorari will only be granted where there are special and important reasons. The rule further provides that the reasons stated for granting the writ including conflict among courts of appeal are not controlling. It is, therefore, respectfully submitted that where, as here, it is evident from the petition for the writ and the responses thereto, that the decision below is clearly correct, that the issue has already been resolved as far as the future is concerned, and that with respect to pending cases the matter is of limited significance, there are no "special and important reasons" for granting the writ.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petitions for Writs of Certiorari, should be denied.

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